ISKANDAR ABDUL HAMID

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL KADIR MUSA J
[CRIMINAL REVISED NO: 43-25-2004]
17 FEBRUARY 2005

CHILDREN AND YOUNG PERSONS: *Refugee child - Child charged in court and claiming trial - Application for officer from United Nations High Commissioner for Refugees to be present in court during proceedings - Whether officer could be classified as person "directly concerned" and "such other responsible person" - Child Act 2001, ss. 12(3)(b), (c), 90(7), (11) - Whether application allowed*

CRIMINAL PROCEDURE: *Revision - Refusal of magistrate to allow an officer from United Nations High Commissioner for Refugees to be present in court proceedings involving child refugee - Whether officer could be classified as person "directly concerned" and "such other responsible person" - Child Act 2001, ss.12(3)(b), (c), 90 (7), (11)*

The child Iskandar, an Indonesian citizen, was charged in the court for children under s. 6(3)(c) of the Immigration Act 1959/63 whereby he claimed trial. An application by the child's representative for the court to allow one Asha Dhillon, an officer from the United Nations High Commissioner for Refugees ('UNHCR') to be present in court during the proceedings, pursuant to s. 12(3)(b) of the Child Act 2001 ('the 2001 Act') was disallowed by the learned magistrate. Hence, this application for revision of said decision.

Held (allowing the application):

[1] Asha Dhillon was an officer of UNHCR and was responsible for the welfare of the aforesaid Iskandar, a child with refugee status. She could certainly be classified as a person "directly concerned" in this case within the meaning of s. 12(3)(b) of the 2001 Act and within meaning of such other "responsible person" found in s. 12(3)(c), 90(7) and 90(11) of the same. Hence, Asha Dhillon should be allowed to be present at the sitting of Iskandar's trial within the context of s. 12(3) of the 2001 Act. (p 509 c)

[2] Such "other responsible person" can only 'say anything in extenuating or mitigation of the penalty or otherwise' if he or she be allowed to be present during such trial. Allowing Asha Dhillon or any other lawfully designated officer of UNHCR to be present at such a trial will completely eliminate any remotest inference that, the learned magistrate, in all probability, will not, on the facts of the case, find the child not 'guilty' or that the 'offence is proved' against Iskandar, which should have convincingly persuaded the learned magistrate to grant the learned counsel's application aforesaid. It will be more so in this case, since Iskandar fell within the ambit of "refugee status" by virtue of the "Convention of the Rights of the Child" *vide* General Assembly Resolution 44/25 of 20 November 1989. It was adopted as 1967 Protocol *vide* Resolution 2198 (XX1) by the United Nations General Assembly, to which Malaysia is one of the signatories. (p 510 e-f)

[Order of learned magistrate set aside and substituted with an order allowing Asha Dhillon to attend the trial. Any other responsible officer(s) of the UNHCR is/are equally able to do so.]

Legislation referred to:
Immigration Act 1959/63, ss. 6(3)(c), 12(2), (3)(b), (c), 90(7), (11)

For the applicant - Amer Hamzah Arshad; M/s Zain & Co
For the prosecution - Khairul Anuar Wahab DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Kadir Musa J:
This matter came up for Revision before me on 27 October 2004 as a result of the refusal of the learned Magistrate to allow Puan Asha Dhillon, an officer to United Nations High Commissioner for Refugees (UNHCR) under s. 12(3)(b) of The Child Act 2001 ("The 2001 Act").

From the court's record, the child concerned known only as Iskandar, an Indonesian citizen, was arrested on 1 August 2004. On 17 August 2004, he was charged in the court for children in the presence of his mother under s. 6(3)(c) of the Immigration Act 1959/63, whereby he claimed trial. His counsel then, one Miss Fashilah (obtained not from the court's record, but from the letter dated 19 October 2002 from Ms Zain & Co, p. 1, para 1) informed the court that on behalf of the said child she would like to make a representation to the office of the Deputy Public Prosecutor. That being so, the case was fixed for mention to 22 September 2004.

On 22 September 2004, the court was informed by the prosecuting officer that there was no instruction from the learned Deputy Public Prosecutor in response to the counsel's representation and requested the court to fix for mention to another date. The court accordingly fixed it to 11 October 2004 for mention.

On 11 October 2004, the said child was represented by Encik Amer Hamzah. On that date, the prosecuting officer informed the court that on instruction of the learned Deputy Public Prosecutor, the case was to proceed. It was at that juncture that Encik Amer applied to the court to allow Puan Asha Dhillon to be present in the court during the proceedings which was turned down by the court.

In the same proceedings, Encik Amer requested the court for a short mention date on the ground that they have contacted Putrajaya to have the charge withdrawn against the child who has "a refugee status". That application was allowed and the case was fixed for final mention to 1 November 2004.

Before the date for the said last mention, Encik Amer, on 19 October 2004, wrote to this court to have the ruling of not allowing Puan Asha Dhillon to be determined by me. After going through with his said letter, I called the record for purposes, of revision. In revision, I allowed the application as per second paragraph of my order dated 28 October 2004.

The relevant part of my said Order states as follows:

> ...
>
> DAN ADALAH JUGA DIPERINTAHKAN bahawa mana-mana pegawai daripada Pesuruhjaya Tinggi Bangsa-Bangsa Bersatu mengenai pelarian (UNHRC) Kuala Lumpur dibenarkan hadir semasa Mahkamah bersidang untuk pendengaran kes mengikut seksyen 12(3)(b) dan (c) Akta Kanak-Kanak.

Section 12(3)(b) and (c) of The 2001 Act provides:

> (3) No person shall be present in any sitting of a Court For Children except:
>
> (a) ...;
>
> (b) the children who are parties to the case before the Court, their parents, guardians, advocates and witnesses, **and other persons directly concerned in that case**;
>
> and
>
> (c) **such other responsible persons as may be determined by the Court**. (emphasis added).

Section 12(3) clearly demonstrates a clear legislative intention to minimize free attendance of the general public "at any sitting of a court for children" as oppose to any open court trial. The wisdom for such a requirement is "... to enable children (in such trial (s)) to be brought to and from the court for children with privacy." as provided by s. 12(2) of the same Act which justifies the restrictions quoted above.

In the said s. 12(3)(b) it allows "other persons directly concerned in that case", and the said s. 12(3)(c) specifically permits "such other responsible person as may be determined by the court." to "... be present at any sitting of a court for children ...". The words "the court" found in paras. (a)-(c) of s. 12(3) must necessarily be the "court for children" sitting to hear any case involving children within the intentional ambit of the said Act. In the present case, such "court" must therefore be the court which disallowed Puan Asha Dhillon to be present at the trial of the aforesaid Iskandar; thus the revision before me.

It is trite law that Higher Court should not disturb any exercise of judicial discretion conferred to an officer of any lower court, unless it was wrongly exercised, or in doing so, such an officer did not sufficiently give judicial consideration of relevant facts. From the record and without the aid of the learned Magistrate's grounds of judgment, she must have exercised her judicial discretion to disallow the aforesaid application based on s. 12(3)(c) of The 2001 Act premised on the word "... as may be determined by the court." In that context, I would not say that she was wrong to exercise her discretion. The question for me to consider is: "Whether or not she had taken sufficient judicial consideration of all the relevant facts before her in exercising that discretion?" is the crux of my revision.

Before proceeding any further, I must categorically state here that, even though "to" exercise such a discretion is not wrong, it need not necessarily be judicially right "in" exercising it within the purport of The 2001 Act based on all the relevant facts of this case.

From the printed evidence before the court, the application was made on the basis that Puan Asha Dhillon was an officer of UNHCR. She was responsible for the welfare of the aforesaid Iskandar, a child with a refugee status. In making the said application, the learned counsel did inform the court that:

... Puan Asha Dhillon [adalah] pegawai UNHCR ... [dan] segala hal-ehwal penama adalah di bawah UNHCR ...

sekiranya Penama didapati bersalah, kesan dan akibatnya akan mempunyai impak di mana tugas UNHCR akan pastikan kebajikan Penama.

(emphasis added), and

... Penama mempunyai status refugee.

Those facts were not disputed by the prosecution, and must therefore be taken to be accurate informative facts for the learned Magistrate to give due consideration in the light of ss. 12(a) and (b), 90(7) and 90(11) of The 2001 Act.

As an officer of UNHCR, Puan Asha Dhillon can certainly be classified as a person "directly concerned" in this case within the meaning of the said s. 12(3)(b). As such, she can be said to fall within meaning of such other "responsible (person)" found in the aforesaid ss. 12(3)(c), 90(7) and 90(11).

Section 12(3)(b) is certainly not disjunctive in effect with para. (c) of the same. In para. (b) itself, the "comma" after the words "parents," "guardians," and "witnesses" is again not disjunctive in nature. That being so, "any person directly concerned" in this case can be present together with Iskandar's "parents", "guardians" if any, "advocates" and "witnesses" of the case. Since Puan Asha Dhillon is a "person directly concerned" with any child with refugee status, I held that she should be allowed "to be present at (the) sitting of (Iskandar's trial)" within the context of s. 12(3) of The 2001 Act

From the facts of this application, it cannot be denied that Puan Asha Dhillon would fall within the category of "responsible (person)" referred to in the aforesaid ss. 12(3)(c), 90(7) and 90(11). All those three sub-sections make reference to the word "other" before the words "responsible person". As such, any "responsible" UNHCR officer other than Puan Asha Dhillon, will equally be eligible and should be allowed to attend any trial of Iskandar in the court for children; hence my order as quoted earlier. The same reasoning also applies to s. 12(3)(b) in relation to the words "other persons directly concerned ...".

The importance of the presence of such a person as Puan Asha Dhillon carves its significance and the wisdom of The 2001 Act by virtue of s. 90(11) of the same. That section states:

(11) if:

(a) a finding of guilt has been recorded; or

(b) the Court is satisfied that the offence is proved,

the child and the child's parent or other responsible person, if present, shall then be asked if they desire to say anything in extenuation or mitigation of the penalty or otherwise.

In the said s. 90(11) the words "if present" were legislatively included therein not without the purpose. My reading of s. 90 of The 2001 Act, persuaded me to conclude that it concerns any trial proper of a child in any court for children as in the present case. It will certainly defeat the legislative intention of inserting those words in the said s. 90(11), if, at the end of Iskandar's trial, the court should find him "guilty" (s. 90(11)(a) *ibid*.), or "that the offence is proved" (s. 90(11)(b), *ibid*. against him, by disallowing "other responsible person" (s. 90(11), 90(7) and 12(3)(c), *ibid.*) to be present during the trial of the said child. Such "other responsible person" can only "... say anything in extenuating or mitigation of the penalty or otherwise" if he or she be allowed to be present during such trial. I would venture further to say that, by allowing Puan Asha Dhillon or any other lawfully designated officer of UNHCR to be present at such a trial will completely eliminate any remotest inference that, the learned Magistrate, in all probability, will not, on the facts of the case, find the child not "guilty" or "that the offence is proved" against Iskandar, which should have convincingly persuaded the learned Magistrate to grant the learned counsel's application aforesaid. It will be more so in this case, since Iskandar falls within the ambit of "refugee status" by virtue of the "Convention of the Rights of the child" *vide* General Assembly Resolution 44/25 of 20 November 1989. It was adopted as 1967 Protocol *vide* Resolution 2198 (XX1) by the United Nations General Assembly, to which Malaysia is one of the signatories.

On the premises above and on all the relevant undisputed facts of the case before me, I concluded that the aforesaid application should not have been turned down by the learned Magistrate. As such, I accordingly set aside her order and substituted it with an order not only allowing Puan Asha Dhillon to attend the trial of Iskandar, but it also applies to any other responsible officer(s) of the UNHCR is (are) equally able to do so.